

1 DUANE M. GECK (State Bar No. 114823)
2 Email: dmg@severson.com
3 DAVID E. PINCH (State Bar No. 124851)
4 Email: dep@severson.com
5 DONALD H. CRAM, III (State Bar No. 160004)
6 Email: dhc@severson.com
7 SEVERSON & WERSON
8 A Professional Corporation
9 One Embarcadero Center, Suite 2600
10 San Francisco, CA 94111
11 Telephone: (415) 398-3344
12 Facsimile: (415) 956-0439

13 Attorneys for Plaintiff Ford Motor Credit Company, LLC

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 FORD MOTOR CREDIT COMPANY,
18 LLC, a Delaware Limited Liability
19 Company,

20 Plaintiff,

21 vs.

22 LEWIS FAMILY ENTERPRISES, INC.,
23 dba BOB LEWIS LINCOLN
24 MERCURY, a California corporation,
25 and STEVEN ROBERT LEWIS, an
26 individual,

27 Defendants.

No. C 07-03301 RS

**DECLARATION OF PHIL
WARD IN SUPPORT OF FORD
CREDIT'S *EX PARTE*
APPLICATION FOR WRIT OF
POSSESSION AND FOR
TEMPORARY RESTRAINING
ORDER**

1 I, PHIL WARD, declare as follows:

2
3 1. I am employed by Ford Motor Credit Company, LLC ("Ford Credit"),
4 as its Territory Sales Manager, Fresno.

5 2. I am familiar with the manner and procedures by which the records,
6 letters and memoranda contained in Ford Credit's files are prepared and
7 maintained. Those records, letters and memoranda are prepared by agents or
8 employees of Ford Credit in performance of their regular business duties. Those
9 records, letters and memoranda are made either by persons with knowledge of the
10 matters they record or from information supplied by persons with such knowledge.
11 It is Ford Credit's regular business practice to maintain such records, letters or
12 memoranda in the course of its business. The documents herein contained and
13 referenced are business records produced and maintained in this above described
14 manner. Except as otherwise specifically stated in this Declaration, the facts set
15 forth herein are based on my review of the files to this account and if called as a
16 witness I could and would be competent to testify to those facts.

17 3. Plaintiff Ford Credit is, and at all material times hereto, has been, a
18 Delaware limited liability company. Ford Credit has its principal place of business
19 in the state of Michigan. Ford Credit is in the business of providing loans and lines
20 of credit to dealers, such as defendant, Lewis Family Enterprises, Inc., dba Bob
21 Lewis Lincoln Mercury ("Bob Lewis Lincoln Mercury"), as described below.

22 **A. Wholesale Agreement with Bob Lewis Lincoln Mercury**

23 4. Ford Credit and Bob Lewis Lincoln Mercury entered into an
24 agreement titled Automotive Wholesale Plan Application for Wholesale Financing
25 and Security Agreement dated December 12, 2003, ("Wholesale Agreement"). A
26 copy of the Wholesale Agreement is attached hereto as Exhibit "A" and is
27 incorporated by this reference. Under the Wholesale Agreement, Ford Credit
28

1 provided Bob Lewis Lincoln Mercury inventory financing for the acquisition of
2 new and used motor vehicles for sale and lease through Bob Lewis Lincoln
3 Mercury's retail automotive sales business.

4 5. Under the Wholesale Agreement, Bob Lewis Lincoln Mercury granted
5 Ford Credit a security interest as follows:

6 As security for all Advances now or hereafter made by
7 Ford Credit hereunder, and for the observance and
8 performance of all other obligations of Dealer to Ford
9 Credit in connection with the wholesale financing of
10 Merchandise for Dealer, Dealer hereby grants to Ford
11 Credit a security interest in the Merchandise wherever
12 located now owned or hereafter acquired by Dealer,
13 accessions thereto, accessories and replacement parts
14 therefore, and in the proceeds and products thereof in
15 whatever form, of any sale or other disposition of the
16 Merchandise or other collateral, and in accounts,
instruments, chattel paper, general intangibles, contract
rights documents and supporting obligations arising from
the disposition of the Merchandise or other collateral; and
Dealer hereby assigns to Ford Credit, and grants to Ford
Credit a security interest in, all amounts that may now or
hereafter be payable to Dealer by the manufacturer,
distributor or seller of any of the Merchandise by way of
rebate or refund of all or any portion of the purchase price
thereof.

17 6. Ford Credit and Bob Lewis Lincoln Mercury entered into a Security
18 Agreement dated February 26, 2004. Under the Security Agreement, Bob Lewis
19 Lincoln Mercury granted Ford Credit a security interest in:

- 20 a. All equipment, fixtures, furniture, demonstrators and
21 service vehicles, supplies and machinery and other
22 goods of every kind.
23 b. All motor vehicles, tractors, trailers, service parts and
24 accessories and other inventory of every kind and
25 accession thereto.
26 c. All accounts, instruments, chattel paper and general
27 intangibles, contract rights, documents and supporting
28 obligations thereto.

29 A copy of the Security Agreement is attached hereto as Exhibit "B" and is
30 incorporated by reference.

1 7. On or about January 13, 2004, Ford Credit and Bob Lewis Lincoln
2 Mercury entered into a Master Loan and Security Agreement and Supplement
3 thereto ("Capital Loan Agreement"). A copy of the Loan Agreement is attached
4 hereto as Exhibit "C".

5 8. Under the Capital Loan Agreement, Ford Credit lent Bob Lewis
6 Lincoln Mercury \$800,000.00 to be repaid with interest as set forth in the
7 agreement.

8 9. The Capital Loan Agreement includes a cross default provision by
9 which a default under any security document or other agreement between Bob
10 Lewis Lincoln Mercury and Ford Credit is a default under the Capital Loan
11 Agreement and Ford Credit is entitled to accelerate the loan balance that Bob
12 Lewis Lincoln Mercury owes to it under the Capital Loan Agreement.

13 10. Under the Capital Loan Agreement, Bob Lewis Lincoln Mercury
14 granted Ford Credit a security interest in specific collateral. The collateral includes
15 the vehicles identified in the Wholesale Agreement. The complete description of
16 the collateral is as follows:

17 The term "Collateral" shall mean, collectively, all of the
18 personal property now owned or hereafter acquired by
19 [Bob Lewis Lincoln Mercury], including without
20 limitation (1) all equipment, fixtures, furniture,
21 demonstrators and service vehicles, supplies and
22 machinery and other goods of every kind, (2) all motor
23 vehicles, tractors, trailers, implements, service parts and
24 accessories and other inventory of every kind and an
25 accessions thereto, (numbers (1) and (2) above
26 collectively referred to as the Personalty") and (3) all
27 accounts, instruments, chattel paper, general intangibles,
28 contract rights documents and supporting obligations
thereto (collectively, the "Intangibles").

1 11. The collateral identified under the Wholesale Agreement, the Security
2 Agreement, and the Capital Loan Agreement is collectively referred to as the
3 “Collateral”.

4 12. Ford Credit perfected its security interests in the Collateral by filing a
5 UCC-1 financing statement with the Office of the Secretary of State of California
6 on October 28, 2003, as document number 0330360194, and all amendments and
7 continuation statements thereafter. Copies of Ford Credit’s UCC-1 Financing
8 Statements are attached as Exhibit “D” and are incorporated by reference.

9 13. All of the loan and security agreements identified above and attached
10 hereto as Exhibits “A” through “D,” inclusive, are collectively referred to as the
11 “Loan Documents”.

12 **B. Defaults by Bob Lewis Lincoln Mercury Motors under**
13 **Wholesale Agreement**

14 14. Ford Credit lent money and extended credit to Bob Lewis Lincoln
15 Mercury under the Wholesale Agreement and therefore performed all conditions,
16 covenants and promises required of it in accordance with the terms and conditions
17 of the Loan Documents.

18 15. Ford Credit conducted an audit of the inventory and accounts of Bob
19 Lewis Lincoln Mercury on June 13, 2007. Ford Credit determined pursuant to that
20 audit that Bob Lewis Lincoln Mercury has defaulted on its obligations under the
21 Wholesale Agreement. Bob Lewis Lincoln Mercury has sold vehicles and failed to
22 repay Ford Credit. This creates a sales out of trust or “SOT” condition. This is a
23 serious breach of the Wholesale Agreement because Ford Credit has lost its vehicle
24 Collateral and Bob Lewis Lincoln Mercury has received the proceeds from the sale
25 of those vehicles and used the money for other purposes—effectively reducing
26 Ford Credit’s Collateral that secures its loans of money to Bob Lewis Lincoln
27 Mercury.

1 16. As of the audit Ford Credit conducted on June 13, 2007, Bob Lewis
2 Lincoln Mercury owes Ford Credit for the principal sums on 22 SOT vehicles
3 totaling \$497,754.70. A copy of the spreadsheet that identifies each SOT vehicle
4 sold by vehicle identification number, date of sale, and balance owed is attached
5 hereto as Exhibit "E".

6 17. As a result of these defaults and through this lawsuit, Ford Credit is
7 exercising its rights under its Wholesale Agreement and Security Agreement to
8 accelerate the remainder of the payments due for the financing of the vehicle
9 inventory. This right is granted to Ford Credit under the Wholesale Agreement at
10 ¶9 which provides: "Upon the occurrence of an Event of Default Ford Credit may
11 accelerate, and declare immediately due and payable, all Advances made hereunder
12 together with accrued interest and flat charges."

13 18. Ford Credit has demanded that Bob Lewis Lincoln Mercury pay the
14 amounts owing, but Bob Lewis Lincoln Mercury has failed and refused to pay the
15 amount now due. As of June 15, 2007, the total principal loan balance that Bob
16 Lewis Lincoln Mercury owes to Ford Credit under the Wholesale Agreement is
17 \$2,333,494.56, plus accrued interest and flat fees as billed for May, 2007 statement
18 of \$28,000.31.

19 **C. Defaults by Bob Lewis Lincoln Mercury Motors under**
20 **Capital Loan Agreement**

21 19. Under the Capital Loan Agreement a default under any other
22 agreement between Ford Credit and Bob Lewis Lincoln Mercury is a default under
23 the Capital Loan Agreement. As a result of Bob Lewis Lincoln Mercury's default,
24 Ford Credit elects to accelerate the balance that Bob Lewis Lincoln Mercury owes
25 to it under the Capital Loan Agreement.
26
27
28

1 20. As of June 15, 2007, Bob Lewis Lincoln Mercury owes Ford Credit
2 under the Capital Loan Agreement the amount of \$269,114.82. Interest continues
3 to accrue at the rate stated in the Capital Loan Agreement.

4 **D. Ford Credit has Contractual Right to Possession of its**
5 **Collateral**

6 21. Under the Wholesale Agreement, the Security Agreement and the
7 Capital Loan Agreement, Bob Lewis Lincoln Mercury granted to Ford Credit a
8 security interest in the Collateral.

9 22. By reason of Bob Lewis Lincoln Mercury's defaults as alleged above
10 and pursuant to the terms of the Wholesale Agreement at ¶9, and the terms of the
11 Capital Loan Agreement at ¶7, Ford Credit is entitled to immediate possession of
12 the Collateral in which Ford Credit holds a security interest.

13 23. Ford Credit has made demand upon Bob Lewis Lincoln Mercury to
14 assemble and deliver the Collateral to Ford Credit.

15 24. Despite Ford Credit's demand upon Bob Lewis Lincoln Mercury to
16 assemble and deliver the Collateral, Bob Lewis Lincoln Mercury has failed and
17 refused to deliver possession of the Collateral to Ford Credit. Bob Lewis Lincoln
18 Mercury remains in possession of the Collateral in defiance of Ford Credit's
19 security interest and contractual rights to possession.

20 25. Ford Credit has inspected Bob Lewis Lincoln Mercury sales lot at 911
21 Capitol Expressway Auto Mall, San Jose, California 95136, and attests that the
22 Collateral, including the vehicle inventory, is located and kept at this principal
23 place of business.

24 26. As of June 15, 2007, the total value of the vehicle inventory subject to
25 Ford Credit's security interest is approximately \$2,287,804.15.

- a. The new vehicles are valued at Bob Lewis Lincoln Mercury's dealer invoice for the acquisition of the new vehicles at \$2,181,193.18.
- b. The program vehicles are valued at 70% of the original floored balance at \$54,828.90. The 70% of the original floored balance is based upon Ford Credit's experience in selling similar new and used motor vehicles.
- c. The used vehicles are valued at 70% of the original floored balance at \$51,782.07. The 70% of the original floored balance is based upon Ford Credit's experience in selling similar new and used motor vehicles.

A schedule of the vehicle inventory including Ford Credit's valuation of each used motor vehicle by make, model, year, and vehicle identification number is attached hereto as Exhibit "F" and is incorporated by reference.

27. The parts, accessories, equipment, furniture and fixtures are valued at \$298,350.00. Of that amount \$139,358.00 is represented as the value of the parts. Ford Credit has adopted the value Bob Lewis Lincoln Mercury placed on these assets in its April 30, 2007 Dealer Financial Statement. A copy of the Dealer Financial Statement is attached hereto as Exhibit "G".

28. While Ford Credit's Collateral has an estimated aggregate Vehicle Collateral and parts and accessories value of \$2,427,162.15, it is owed the following principal amounts:

Wholesale Loan Agreement	\$2,333,494.56
Capital Loan Agreement	<u>\$ 266,679.99</u>
Total	\$2,600,174.55

1 29. Ford Credit is informed and believes and alleges that the Collateral in
2 which Ford Credit has a security interest has not been taken for a tax, assessment or
3 fine pursuant to statute, or seized under any execution against the property.
4

5 I declare under penalty of perjury under the laws of the United States and of
6 the State of California that the foregoing is true and correct this 18th day of June,
7 2007, at Fresno, California.
8

9 /s/ Phil Ward
 Phil Ward
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ATTESTATION

I hereby attest that I have on file all holograph signatures for any signatures indicated by a "conformed" signature (/S/) within this efiled document.

DATED: June 19, 2007

SEVERSON & WERSON
A Professional Corporation

By: /s/ Donald H. Cram, III
Donald H. Cram, III

Attorneys for Plaintiff
FORD MOTOR CREDIT COMPANY,
LLC